No. 4363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WONG LUNG SING, alias WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney.
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 45198

No. 4363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WONG LUNG SING, alias WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT

The plaintiff in error Wong Lung Sing was convicted in the United States District Court for the Northern District of California of violations of the laws relating to narcotic drugs.

On March 8, 1924, an indictment in two counts was presented against plaintiff in error and one Charlie Wong You.

The first count charged a violation of the Act of February 9, 1909, as amended, being the "Narcotic Drugs Import and Export Act". The charging part of the count was as follows:

> "The said defendants did then and there wilfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain opium, to wit: fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and one bindle of yen shee containing 10 grains, which said prepared smoking opium and yen shee as the said defendants then and there well knew, had been imported into the United States contrary to law."

In the second count there was a charge of violating the Act of December 17, 1914, as amended, commonly known as the Harrison Anti-Narcotic Act. The charging part of the count was as follows:

> "The said defendant, did then and there knowingly, wilfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages."

The plaintiff in error alone was placed on trial and was convicted upon both counts of the indictment and being arraigned for sentence on February 9, 1924, was sentenced to

> "Be imprisoned for period of three (3) years in the United States Penitentiary at McNeill Island, Washington, as to each of the two counts

of the indictment. Said judgments of imprisonment to run concurrently and that he pay a fine of One Thousand ($1,000.00) Dollars." (Tr. p. 62.)

There was a motion for a directed verdict made and denied for each count.

At the trial the government presented the testimony of four witnesses. This testimony is set forth at pages 9 to 29 of the Transcript. It may be summarized as follows:

Witness OYER was a Deputy Sheriff of Monterey County. Knew defendant by sight. On the afternoon of November 18, 1923, witness and Traffic Officer Elasho saw defendant and another driving along the road going southerly towards Monterey. The officers followed the defendants about 15 miles and when within a mile of the City limits of Monterey this defendant got up and pulled the curtains down in the rear of the car. The officers went past and turned their machine around and the defendants "lit out for Monterey." They were overtaken about a mile down the road, and as they were exceeding the speed limit they were arrested. Elasho took charge of the car, and witness took "that suit case there with the opium in it" and "he wanted to know if we had a search warrant for that suit case. I told him no, we had no search warrant. We arrested him for speeding. We went to Monterey and turned it over to the Chief of Police. He got a search warrant and found the opium in the case." (Witness

identified the suit case and "these cans and this blanket" as the contents. They were marked for identification.) Witness said, regarding questions asked of the defendant at the jail, there being present a State Deputy District Attorney, Justice of the Peace, Chief of Police Cording, and Traffic Officer Elasho, defendant said he knew nothing of the opium, the contents of the valise or suit case, that somebody put it in his car at Pajaro, and we asked him where the keys were and he said he had no keys. Mr. Cording asked him who the overcoat belonged to and he said it didn't belong to him. I observed the search by the Police Officers of the defendant Wong Mat. I saw what the officers obtained from the defendant. They found two keys, a hypodermic needle and some opium on a card or wrapped up in a paper; I think it was Yen Shee they called it. On the initial opening of the suit case, it was opened by the police officers. Traffic Officer Elasho had a key that time, a skeleton key, or some key that would fit it. He opened it with that. Afterwards we found these two keys on the person of the defendant. That opened the suit case. The place that I saw this car stop on this particular night of the arrest there was a big hedge with buildings on the inside of it, with a little opening that runs through a heavy cypress hedge. I think that the Chinese help from the Del Monte Hotel stop there or had their headquarters there. There were bunk houses or cottages there. Before the suit case was opened at the jail the defendant told me that he was cutting fish in the can-

nery and was going to see his cousin, Wong Chong, and that he had his rubber boots in this suit case and knife and that he was going to town to cut fish in the cannery.

On cross-examination witness said, among other things: "The defendant got up and pulled the curtain down. I went past him 100 yards, turned the machine around to go back and see who they were and what they were doing, and the driver lit out with his machine and I had to turn around and we overtook them about a mile down the road, near the City limits of Monterey and we stopped them. Elasho jumped off and went back and placed them under arrest. They were exceeding the speed limit. I left my car parked down the road and came back on foot. I know he was talking to this man when I got back there and said, 'What have you got in the suit case?' and he said, 'I don't know.' He addressed that to this defendant here. The suit case was lying in the bottom of the sedan in the rear in the back seat. There was nothing over the suit case. It was closed. He said, 'What have you got in the suit case?' and he said, 'I can't say, I don't know.' This Chinaman here said that. Then Elasho said, 'I will find out,' and he said, 'You have not a search warrant to find out.' This Chinaman here said that. So Elasho said, 'That will be all right. I will arrest you for speeding and I will take you to town where we will get a search warrant.' I took the suit case out of his car, and put it in mine, and Elasho took charge of the sedan and I went into town and turned

it over to Chief of Police Cording and he immediately got a search warrant and searched the suit case. They opened the suit case and found the contents as it stands there now. I saw the Chief of Police Cording find the key on the defendant Wong Lung Sing. He found the key in his coat pocket. He found two keys on a string." (Tr. pp. 9-16.)

Witness CORDING, Chief of Police of the City of Monterey, testified that he knew defendant Wong Lung Sing by sight. Saw him on November 18, 1923. "The man was brought in with a charge of reckless driving, and under suspicion of carrying contraband drugs, opium and stuff like that, he was brought before me and I asked him what he had in the suit case, and he told me he had had clothes in there, and that he was going to work in a cannery. He said he was going to work in a cannery in Monterey, that he was going to stop at 809 Ocean Avenue, at a place called the Wong Chong Hotel, and I asked him to open the suit case, and he told me that he did not have the key. I asked him if he was satisfied if I opened the suit case, and he told me to get a search warrant, and I turned and immediately went in a car to the district attorney's office, and brought him to the office, and he made out an affidavit for a search warrant, and got the search warrant and took it over to the justice of the peace's house and swore to it and came back, and while I was searching his body for his keys, Officer Elasho tried some of his keys and found one of them to fit the suit case. I found two keys on the defendant;

one fit the suit case and one was smaller, on a string. I found these keys in his coat pocket, not an overcoat, an outside coat pocket like this. And I found a small can of opium, a hypodermic needle, and a small quantity of yen shee. When I opened the suit case I found the blanket was over the top, and there were 52 tins of opium wrapped up in newspaper and tied with string. These look to be the same ones that I observed at that time. On every one of these cans was marked 'F. W. A. Cording.' I have got my mark on every one of them. The marks are still on some of them. I had a conversation with the defendant. It was all in English. He seems to speak very good English. I could understand him readily." (Tr. pp. 18-22.)

It was stipulated by the attorney for the defendant that the contents of the cans were opium.

Witness resumes: "I tried one of the keys on this suitcase and it opened it. It was one of the keys that I took off this defendant. It was on a string. One of the keys was smaller than the other. One opened the suitcase; that is it."

After I finished examining the suitcase I locked it up. I had the district attorney telephone Mr. Smith, federal narcotic agent at San Francisco, and he sent Officer Roberts down the following day to take the property in his possession. The following day the narcotic officer came down and took the suitcase. "I found some yen shee in the pocket of the defendant, Wong Lung Sing. It was a very

small quantity and a very little bit of it. It was in small bindles. I found it in his coat pocket, in one of his coat pockets. I asked him what he was doing with it, and he told me he was eating it, he was an opium smoker, to keep his nerves quiet. It was a very small quantity of what they call yen shee, about a thimble full. There was also a small can of opium about the size of a spool. I found that in the coat pocket of the defendant Wong Lung Sing. He told me that he had it for his own use. This yen shee is the ashes of opium that has been smoked and taken out of the pipe, the remains of the pipe. He did not deny that the yen shee was his. He said it was his. I also found a hypodermic needle on him." (Tr. pp. 21, 22.)

Witness ROBERTS, a narcotic inspector of the Internal Revenue Service, testified: He recognized the suitcase and contents. Obtained the suitcase and contents and brought it "to our office, 244 Post Office Building." It has been in our office in the safe custody of the narcotic agent ever since. This is the bindle of yen shee and this is the hypodermic needle found on the defendant. It was stipulated to be yen shee and the artciles were put in evidence and marked Government's Exhibit 2. (Tr. p. 22.)

Witness ELASHO was on the 18th day of November, 1923, a traffic officer and police officers of the city of Monterey. Knew the defendant Wong Lung Sing, alias Wong Mat, who sits there. Was with Officer Oyer on the occasion referred to but that witness. We observed a car going along with two Chi-

nese in it, a closed car. When they saw me they acted kind of suspicious. After we observed them they kind of stopped, hesitated and looked around. They acted as if they wanted to turn the car around and go back. We followed them 12 or 14 miles south. We got to about one mile outside of Monterey. They came to a hedge. Inside of this hedge is a Chinese vegetable garden, and some Chinamen are living there all the time. There are Chinese quarter for men to live in there. The car stopped there, and this defendant, Wong Lung Sing, was sitting up in the front seat with the driver, and immediately after the car stopped he climbed over the seat and got in back of the car and pulled the two side curtains and the rear down, and we speeded up to see what they were going to do and while we were doing that he turned around and saw us and started out again and speeded up to about 40 or 50 miles an hour and then I arrested them on a charge of speeding. I searched the person of this man here and found a little quantity of opium and some yen shee in his vest pocket; then I asked him what he had in his suitcase and he said he had a knife and some boots and some clothes that he was going to work in the cannery. So I told him I would like to look in the suitcase and he said, "No, you no lookee, you no catchem search warrant." This Chinaman said that and I said, "All right, we go to town and I catchem search warrant." He said, "No, you no catchem." Thereupon the defendant was arrested and the suitcase taken out of the car by Oyer and taken into

town. Chief of Police Cording was informed and he went to the district attorney's office and got a search warrant. While they were gone I asked this Chinese if he had a key and he said, "No," so I had a key that opened a suitcase like his and I tried it, but it never opened the case at all. I tried the lock to see if the key would work and in the meantime the Chief of Police came back and the District Attorney and the Chief of Police with a warrant and were searching for keys and could not find them, so I told them I had a key that would open it, and when we opened the case we found the cans of opium. They were wrapped up in twos, fours and sixes, in packages; they were then arrested and after the arrest was made and the Chief of Police searched the person of this Chinaman again and found a hypodermic needle and two keys to the suitcase that would open this suitcase. He found them in the pocket of the coat of this Chinese, an inside short coat. I asked him myself what he had in the suitcase and he said he had a knife and some boots in there, and said he was going to work in the cannery. I first asked him that when I stopped the car and arrested him; before we came to the Chief of Police's office. The Chief of Police asked him, before he opened the suitcase, what was in there and he said there were some clothes in there, and a knife and some rubber boots and some clothes, and that he was going to work in a cannery.

On cross-examination, witness said: He searched the defendant Wong Lung Sing at the time of the

arrest. Found a little can of opium. Didn't go through all of his pockets. Found a small can of yen shee in the vest pocket. I overlooked searching his front coat pocket because I was satisfied when I found that little can of opium and yen shee that I had a perfect right to arrest him.

Witness ROBERTS, recalled, said: That all the narcotics that were found were unstamped and in illegal condition. There was a stipulation as to the contents of the suitcase, whereupon it was offered in evidence and objected to as immaterial, irrelevant and incompetent, because it had not been connected up with the defendant Wong Lung Sing, and was seized as the result of an illegal, improper and unreasonable seizure of property at the time of the arrest. The objections were overruled and the offer received in evidence and marked. (Tr. pp. 29 and 30.)

On behalf of the defendant testimony was given tending to show that the car in question was owned by one Wong Fat Shing. The defendant testifying, denied certain of the testimony on the part of the government and said that he saw the other defendant, Charlie Wong You, in an automobile, saying he was going to Monterey, whereupon this defendant said that he would go with him to see his uncle, a little after one o'clock. That he, the defendant, didn't take any suitcase or package with him when he went in the automobile with him at Watsonville. The parties were stopped by the traffic officer. Defendant got out of the machine. The officers searched

defendant as he stood by the roadside. He found a small hop toy of opium, a small package of yen shee in defendant's pocket at that time and place, referring to United States Exhibit 2. Witness denied that he made any statement to anybody that the suitcase contained rubber boots, or that he was going to work in a cannery. Denied that he had a key on a ring or any place on his person that would open the suitcase. (Tr. pp. 32-37.)

Other testimony was given tending to show that the defendant was engaged in drying apples in Watsonville.

The court charged the jury orally in a charge set forth in the Transcript at pages 41 to 47.

The assignments of error, appearing at page 65 of the Transcript, are seven in number, but in the printed brief prepared in support of the writ of error but five of the assignments are argued, to-wit:

1) That the court erred in admitting in evidence the suitcase and contents,

2) That the court erred in denying the motion for a direct verdict of not guilty on the first count,

3) That the court erred in denying the motion for a directed verdict of not guilty on the second count,

4) That the court erred in denying the motion for arrest of judgment on the first count for insufficiency of that count, and

5) That the court erred in denying the motion for arrest of judgment on the second count for insufficiency of that count.

I

The First Count of the Indictment Properly Charges an Offense Under "The Narcotic Drugs Import and Export Act."

The first count of the indictment is based upon a provision of the Act entitled "An Act to Prohibit the Importation and Use of Opium for Other than Medicinal Purposes," approved February 9, 1909; (35 Stat. 614;) amended January 17, 1914; (38 Stat-275,) and amended May 26, 1922; (42 Stat. 596,) and being known as "The Narcotic Drugs Import and Export Act."

The provision involved is subdivision (c) of Section 2 of the Act as follows:

> "(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years."

In the indictment it is charged that the defendants at a stated time and place violated a requirement of the Act in that

> "the said defendants did then and there wilfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain opium, to wit: fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and one bindle of yen shee containing 10 grains, which said prepared smoking opium and yen shee as the said defendants then and there well knew, had been imported into the United States contrary to law."

That the crime denounced by the subdivision referred to is properly charged in the language used in the case at bar is supported by the authority of the decisions of this court.

Thus in the case of

Camou vs. U. S., 276 Fed. 120,

there were under review two indictments which had been consolidated. In the one Numbered 8420 it was charged that

> " P. J. Camou,
> hereinafter called the defendant, heretofore, to wit, on the 14th day of May, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium, to wit, ten tins of opium pre-

> pared for smoking purposes which as he, the said defendant, then and there well knew, had been imported into the United States contrary to law."

See record of this Court, *Camou vs. U. S.*, No. 3661.

On appeal the same contention was made that is made in the instant case to the effect that the plaintiff did not set forth facts showing importation or that it was contrary to law.

In passing upon the contention the court said that there were two indictments against plaintiff in error and that

> "one alleged that at a certain time and place within the jurisdiction of the trial court the defendant thereto unlawfully, wilfully and knowingly received, concealed and facilitated the transportation and concealment and after importation of certain specified opium prepared for smoking purposes, which he then and there well knew had been imported into the United States contrary to law."

And the court further said:

> "There is no doubt we think that the indictments were sufficient."

In the case of

> *Ukichi vs. U. S.*, 281 Fed. 525,

there was under review a conviction upon an indictment for conspiracy to commit an offense against the United States. The sufficiency of the indictment was questioned and the court said:

"The allegations of the indictment set forth a general combination unlawfully and feloniously to receive, conceal, buy and sell, and facilitate the transportation, concealment, and sale of certain opium and the preparations and derivatives thereof after importation, defendants knowing the same to have been imported contrary to law in violation of the Act of February 9, 1909, as amended by the Act of January 17, 1914. We believe the indictment sufficiently stated a conspirary to violate the statute cited."

And in the case of

Lee Choy vs. U. S., 283 Fed. 582,

there was an indictment in two counts; there was a conviction on the first and an acquittal on the second. The first count charged an offense under the provisions of the Act referred to. While the general sufficiency of the indictment was not discussed, it was, nevertheless, urged to be insufficient and its sufficiency sustained.

In considering the sufficiency of the indictment here it may be useful to note certain canons of construction in regard to indictments which have come to be well established:

(a) The rules governing criminal pleadings, while no less protective to an accused, have come to be less technical and more practical and decisions rejecting technical objections to an indictment are not now the exception. And this is eminently so from a consideration of the provisions of Section 1025 of the Revised Statutes.

Jelke v. U. S., 255 Fed. 264, 274.

This authority, on page 274, tersely states the doctrine and cites significant cases bearing upon the point, including a pertinent quotation from the case of

Harper v. U. S., 170 Fed. 385, 392.

(b) Defects of form in an indictment are not available on writ of error after verdict.

Section 1025, R. S.;

Connors v. U. S., 158 U. S. 408, 39 L. Ed. 1034;

New York Central Etc. Company v. U. S., 212 U. S. 481, 53 L. Ed. 613, 623;

Armour Packing Company v. U. S., 209 U. S., 56, 84, 52, L. Ed. 681, 695.

(c) In charging a crime created by statutory enactment it is usually sufficient to charge the crime in the words of the statute; this is especially true when the pleader is not coerced by any common law precedent in alleging any particular fact, as he might be in alleging the commission of a crime not established by statute.

Ledbetter v. U. S., 170 U. S. 606, 42 L. Ed. 1162, 1164;

U. S. vs. Gooding, 25 U. S. 460, 473, 6 L. Ed. 693, 697.

The charge here is substantially in the language of the statute quoted. It is said that the defendant did the acts wilfully, unlawfully, *knowingly,* feloniously and *fraudulently;* that he did receive, conceal, buy, sell and facilitate the transportation and concealment *after importation* of the drug. The phrase

"after importation" is equivalent of the phrase "after being imported" and is the statement of a fact. Next the pleader describes the drugs as certain opium, to wit, 55 cans of prepared smoking opium containing 324 ounces 15 grains and one bindle of yen shee containing 10 grains. Having so described the crime, the only remaining requirement of the statute was to charge the defendant with "knowing the same to have been imported contrary to law." Such scienter is clearly charged in and by the statement "which said prepared smoking opium and yen shee as the said defendants then and there well knew had been imported into the United States contrary to law."

It will be noted that this allegation really goes further than required. It might have been sufficient to say that the defendants then and there well knew that the narcotics had been imported into the United States contrary to law, but it went farther and made the direct charge that the drugs had been so imported as the defendants then and there well knew.

Manifestly the averment is sufficient in the absence of a demurrer or motion to strike out. If there were any defect it would be as to form merely.

It is further contended that the phrase "contrary to law" is a mere conclusion of law and not an averment of fact. It may be noted from the record of the Camou case that precisely the same contention was urged upon this court without effect in that case. The phrase is a statement of fact, or at least a mixed conclusion of law and fact and thus proper.

Under Section 1 of the Act referred to, the importation of prepared smoking opium into the United States is prohibited by law under any and all circumstances. Accordingly, when the pleader states that the drug in question is prepared smoking opium and that it has been imported, or is "after being imported," to use the statutory phrase, it is necessarily shown to be imported contrary to law.

This element of the case distinguishes it from the case of

Keck vs. U. S., 172 U. S. 434,

cited by plaintiff in error. In that case the Supreme Court did not rule that the phrase "contrary to law" was a mere conclusion to be disregarded. Its holding was placed upon the ground that the charge there under review did not sufficiently inform the defendant of the accusation against him, and this for the reason that the reference was to legal provisions not found in the section itself; that there was thus the necessity for reference to numerous statutory regulations concerning the importation of merchandise; that accordingly there was not sufficient information given to the defendant to apprise him of the charge

Thus in the Keck case it was said:

> "That the generic expression 'imported into the United States' did not convey the necessary information, because, importing merchandise is not *per se* contrary to law and could only be done in violation of specific statutory requirements."

Here the situation is wholly different. The absolute prohibiting of smoking opium is in the same act and applies to all conditions and all circumstances. As soon as the pleader alleged that the opium was prepared smoking opium and imported into the United States he necessarily charged an importation contrary to law.

In fact, the distinction here contended for is conceded in one of the cases cited by counsel on the subject, the case of

> *U. S. vs. Claflin,* (not Chapin) 25 Fed. Cas. No. 14798, 13 Blatchf. 178.

In that case appears the following language as a portion of the discussion:

> "When the language of a statute comprehends under general terms divers forms of illegality having different characteristics, it may well be considered proper to require something more than the words of the Act."

Here the use of the language of the statute would be sufficient for the reason that any possible importation of smoking opium was contrary to law and this by the very terms of the Act involved.

II

The Second Count of the Indictment Properly Charges an Offense Under the Harrison Anti-Narcotic Act.

The charge in the second count was the unlawful purchase, sale, disposition and distribution of smok-

ing opium not then and there in or from the original stamped package.

This charge is based upon the provisions of a clause in Section 1 of the Act of Congress of December 17, 1914, 38 Stat. 785, as amended February 24, 1919, 40 Stat. 1130. The provision of the section referred to is as follows

> "It shall be unlawul for any person to purchase, sell, dispense or distribute any of the aforesaid drugs, except in the original stamped package or from the original stamped package." (P. 1131.)

It will be noted here that the charge is in the language of the statute, that it sufficiently descends to particulars apprise the defendant of the precise charge he is called upon to meet, and to enable him to plead a conviction or acquittal in bar of any further prosecution for the same offense.

That the phraseology made use of in the charge is not insufficient has been held by this court in the cases of

Dean vs. U. S., 266 Fed. 694;
Dean vs. U. S., 266 Fed. 695.

The contention of plaintiff in error in regard to the second count seems to be that the word "defendant" in the singular is used instead of "defendants." We think that this is a mere defect of form not available upon writ of error after verdict under the provisions of Section 1025 of the Revised Statutes and cases cited above.

It is further contended that the plaintiff in error is not charged to be one of the persons required to register under the provisions of the Harrison Narcotic Act and certain cases are cited involving prosecutions not under Section 1 above referred to, but which were cases brought under Section 8 of the Statute prohibiting unlawful *possession* of narcotics by one not registered.

But counsel fail to appreciate the difference between the sections involved. It is provided in Section 8 that "it shall be unlawful for any person *not registered,* etc., to have possession, etc.," while in Section 1 it is provided that "it shall be unlawful for *any person* to purchase, sell, etc."

Accordingly there are decisions holding that in a prosecution under Section 8, it is necessary to allege and show that the defendant was of a class required to register. But such result does not follow in a prosecution under Section 1. It is needless to enlarge upon this distinction, however, for the Supreme Court of the United States has expressly set the matter at rest in the case of

> *United States vs. Wong Sing,* 260 U. S. 18, 21, 67 L. Ed. 105.

It is there held substantially that in a prosecution for the unlawful purchase of contraband drugs under Section 2 of the Act, which is of a similar character to the Section here involved, it is not necessary that the defendant be of a class who must register and pay special taxes.

III

The Evidence Is Sufficient to Justify the Conviction Upon Both Counts of the Indictment; the Court Did Not Err in Denying a Motion for a Directed Verdict.

The evidence was ample to justify the conviction of the defendant for the crime charged in the first count. It was ample to show his possession of the contraband narcotic drugs. Such having been shown, the jury were authorized to infer his guilt by virtue of the following provision of the same Act:

> "(f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury. (42 Stat. 597.)

The jury were further authorized to infer the guilt of the defendant for the crime charged in the second count from the proof of his possession of the drugs, coupled with the proof that the narcotics that were found were unstamped and in illegal condition. (Tr. p. 29.) Upon such a state of proof the guilt of the defendant could have been inferred by virtue of the provisions of the same section which denounced the crime charged, to wit,

> "It shall be unlawful for any person to purchase, sell, dispose, or distribute any of the aforesaid drugs except in the original stamped

> package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found." (40 Stat. 1131.)

That these presumptions so created by statute are valid and effective can no longer be questioned.

> *Luria vs. U. S.*, 231 U. S. 9, 25, 58 L. Ed. 101;
> *Gee Woe vs. U. S.*, 250 Fed. 428;
> *Fiunkin vs. U. S.*, 265 Fed. 1, 3.

In the brief of plaintiff in error there is no serious, or indeed any contention in respect to the proofs other than to dispute the fact that possession was shown in the defendant. It thus results that this element alone need be considered.

Attention is called to the testimony of the witness Cording beginning at page 18 of the Transcript. Speaking of the defendant it was shown that the Chief of Police asked him what he had in the suitcase and he told the official he had clothes in there and was going to work in a cannery at Monterey. When asked to open the suitcase he responded also untruthfully that he didn't have the key. When asked if the official could open the case he told him to get a search warrant. He did not say in response to these questions that he did not own the suitcase or that he was not concerned in what was done. Thereupon the suitcase was opened and instead of clothes or rubber boots as the defendant had said to

another witness, there was found 52 tins of smoking opium. About the same time on searching the defendant, the same official, Chief Cording, found keys in his pocket which would open the suitcase.

And witness Elasho testified, among other things, beginning at page 23 of the Transscript, that he observed the car with the two Chinese in it acting suspicious; that they stopped and hesitated and looked around, acted like they wanted to turn around and finally when near Monterey, they stopped and this defendant climbed over the seat, got in back of the car and pulled the two side curtains and the rear down, and when the officers went up to see what they were going to do they turned around and started out again at great speed. After being arrested for speeding, witness asked defendant what he had in the suitcase and he said he had a knife and some boots and some clothes and that he was going to work in the cannery. The officer told him he would like to look in the suitcase and the defendant responded, "you no lookee, you no cathem search warrant." Thereupon the suitcase was taken to town and subsequently opened, and that on a second occasion the defendant told the Chief of Police, in response to the question and before the suitcase was opened, that he had clothes in there and a knife and some rubber boots and that he was going to work in a cannery. And it further appears, in fact it is not disputed, that upon searching the defendant at the time of his arrest there was found in his pockets a little can of opium and a small can of yen shee in the

vest pocket. (Tr. p. 27.) This the defendant does not dispute. (Tr. p. 34.) As to the quantity of this it was said that there was a thimble full of the yen shee and the small can of opium was about the size of a spool. (Tr. p. 21.) These latter articles were put in evidence as Exhibit No. 2, (Tr. p. 34 and Tr. p. 22) and the other opium as Exhibit No. 1, (Tr. p. 29) and were seen by the jury, but are not otherwise described or referred to in the bill of exceptions. Sufficient appears to show that as to the articles found on the person of the defendant the quantity was not negligible. Besides, in order to show error in the action of the court below it would have been incumbent upon the plaintiff in error to bring in the bill of exceptions a sufficient description of the exhibit if the point were material.

The testimony quoted is amply sufficient to show that the defendant was in possession of the suitcase and contents, as well as the opium found on his person. Neither is the case, as counsel seem to assume, a question of "constructive" possession. The possession of the suitcase by the defendant was actual. There was not wanting the element of propinquity. It is not a case where the possession is sought to be shown by or through an agent or a person for whose conduct he was responsible, he being in fact himself elsewhere. He was actually present and in apparent control of the suitcase, if the testimony of the government is to be believed. It was shown that he made false statements to the officers respecting the contents of the suitcase in endeavoring to prevent an

examination. He thus showed guilty knowledge or connection. He made false statements in respect to the fact that he had the keys. He was then shown to have actual possession in his pocket of the keys. The latter circumstance, to-wit, possession of the key to open a receptacle containing contraband drugs was deemed a sufficient element to sustain the conviction in the case of

Camou vs. U. S., 276 Fed. 120.

There was no showing in that case that the defendant had any drugs on his person, or dealt in, or had been seen with any drugs, or, indeed, had possession thereof, except the showing in regard to certain trunks. These trunks were in the basement of the hotel where he worked and the circumstances that he denied having keys for certain trunks; that upon the officers threatening a search he produced keys which were fit to open a certain trunk, which, on being opened, disclosed contraband drugs was deemed sufficient evidence to be submitted to the jury to show actual possession.

There was the precise situation here.

Other cases recognizing the probative value of the possession of keys for a trunk, suitcase, or other receptacle containing drugs are the cases of

Bram vs. U. S., 282 Fed. 271;
Pierriero vs. U. S., 271 Fed. 912.

Thus the evidence as to actual possession tended to show possession and ownership in the defendant.

The sufficiency and weight of such evidence was a question for the jury. That such actual possession could be shown by circumstances and circumstances similar to those appearing in the case at bar, is shown in the case of

Pierriero vs. U. S., supra.

Indeed, it may be said that there was an express admission of ownership, for when the defendant manifested such interest in the suitcase as to insist that it be not opened until a search warrant was produced, and, instead of denying ownership, expressly stated to the officers that it was being used for his rubber boots, clothes and knife, he admitted ownership, and that while it later appeared that he untruthfully stated the contents, it was open to the jury to find from his own statement the truth of his claim of ownership.

James vs. U. S., 279 Fed. 11, 112.

No Error in Admitting Evidence.

We need not discuss separately the separate assignment of error to the effect that there was error in receiving in evidence the suitcase and its contents. That the offer was material and relevant could not, of course, be controverted. It was urged that no connection with the defendant was shown, but from what we have said it may be seen that such connection was amply shown. The equivocal conduct of the defendant showing guilty knowledge and connection with endeavors to mislead the officers when

they offered to search the suitcase; his false statement that he had his clothes, rubber boots and knife therein and to be used to work in a cannery; his false statement respecting having any keys; his actual possession of keys to open the suitcase, coupled with the fact that the suitcase and drugs were transported with him, would be be sufficient to show the connection.

It may be noted further that the sentence of the defendant was for three years as to each of the counts, the terms of imprisonment to run concurrently. So far it would result that if the sentence of imprisonment be upheld as to either count it would be sufficiently supported under the doctrine of the case in re

Claasen vs. U. S., 142 U. S. 140.

However, to the language relating to such imprisonment, there is added the requirement "and that he pay a fine in the sum of $1,000." The sentence will be construed, we submit, in the defendant's favor, and so construed would not impose two fines of $1,000 each, while if the conviction be sustained on either of the counts it would support such fine in addition to the imprisonment. Moreover, it is not provided that the defendant suffer imprisonment until the fine be paid. It may well be that the fine could not be made on execution, so that the substantial part of the sentence is the imprisonment. But, as we have seen, if either count with the proofs thereon are sufficient to sustain the three years' im-

prisonment, it would be immaterial that the other would not.

CONCLUSION

In conclusion we submit that the defendant was properly charged with the crime under each count of the indictment, and he was shown to have been in possession of the contraband drugs in large quantities; that it is not to be doubted that he was a dangerous distributor of drugs and that no injustice is done in requiring him to suffer the imprisonment imposed.

The sentence should be affirmed.

Respectfully submitted,

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney.